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(19,152.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 154.

THE CITY OF DAWSON, APPELLANT,

vs.

THE COLUMBIA AVENUE SAVINGS FUND, SAFE DEPOSIT, TITLE AND TRUST COMPANY.

Appellant's Reply to Supplemental Brief of John I. Hall and Olin J. Wimberly, Counsel for Appellee.

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Attorney for Appellant.

DUPONT GUERRY,
CHAS. A. DOUGLASS,
Of Counsel.

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Appellant's Reply to Supplemental Brief of John I. Hall and Olin J. Wimberly, Counsel for Appellee.

I.

Subdivision I of appellee's supplemental brief attempts to sustain the exclusive feature of the franchise of the water company by the fact that a city in Georgia has the right to provide for a water supply, coupled with the assumed fact that a city of the size of Dawson can not afford to maintain two rival systems of waterworks at the same time. In other words, under such condition, appellee seems to think that the water company acquired a valid exclusive franchise by priority of occupancy of the field, and it seems to be attempting to make applicable the principle of *qui prior est tempore, portior est jure.* That the fact that the city is not large

enough to support two systems could not vest the water company with the sole privilege of purveying water in the city, because first in the field, is too clear to require argument or citation of authorities.

II.

In Subdivision II, appellee contends that there is nothing in the Georgia constitution forbidding the creation of "perpetuities or monopolies." In answer, we will only remind the court that even if true, as contended, monopolies were void at common law and "are not commonly conferred by legislative grant, and need no special prohibition in the organic law of a free republic" (please see pages 90–91 of our former brief, citing Birmingham & Pratt Mines Ry. *vs.* Birmingham Ry., 79 Ala. 465, and the opinion of Mr. Justice Brewer in Bienville Water *vs.* Mobile, 186 U. S. 219, 223).

III.

In Subdivision III, appellee cites paragraph 2 of article 1, section 3, of the Georgia constitution, and paragraph 3 of said article and section, and apparently construes the first of said paragraphs, which forbids the passing of any law making irrevocable grants of special privileges, as practically nullified by the other paragraph, which declares that no grant of special privileges shall be revoked, except in such manner as to work no injustice to the corporators or creditors of the incorporation. It was and is our contention that said paragraph 3 was designed to protect rights which had vested at the date of the adoption of the constitution, or at least if it were intended in any way to protect future grants, its operation is necessarily restricted to grants in terms *revocable*. The two paragraphs are component parts of the same section of the constitution and must be construed together, leaving both with the sense of import. To our mind, there is clearly no conflict from any point of view between the two paragraphs, and even conceding to paragraph 3 all claimed of it by ap-

pellee, yet it is plain that it can have no possible application to such a case as the one at bar, simply because there is not a scintilla of evidence of record to show that the city ever attempted in any sense to revoke any franchise or privilege actually granted the water company, nor was any such issue ever raised in appellee's complaint, yet from beginning to end counsel for appellee seem to have been chained to the delusion that the city had actually revoked the privilege of the water company to operate and maintain a water system and sell water in the city of Dawson.

It must be obvious to this court that the charge that the city revoked the franchise of the water company is mere pretense and that appellee would fasten the *main contract*, the *exclusive* feature claimed, upon the people of Dawson, through the mere agreement by the city corporation to pay water rentals. Not being able to successfully maintain that the city had power to directly grant the exclusive franchise, appellee insists with great persistence that the city indirectly conferred such a franchise by agreeing to buy water, and notwithstanding the water company has not performed and is not able to perform its contract, it was maintained that the city was estopped from pleading the facts of nonperformance and the court below incidentally decreed that the city must pay rentals up to and including the year 1911, whether or not the water company performed, the *chief purpose* of the decree being to protect the water company from *competition*. That there can be no such estoppel as this, we think has already been conclusively established in this case (see our main brief, pages 132 *et seq.*).

It is also contended by appellee that while the constitution may have forbidden grants of special privileges *by law*, yet a municipality may confer them *by contract*. That is to say, that the agent, the city, can do what its principal, the legislature, can not do. Thus, to reduce this contention to its last analysis is to demonstrate its error. Such a contention is fully disposed of in 79 Ala. 465.

IV.

In Subdivision IV, of appellee's supplemental brief, it is contended that to hold that a special privilege is revokable would be to overturn the doctrine that a municipal corporation is just as liable as an individual upon its undertakings. We know of no such doctrine, and appellee seems to overlook that the inhabitants of a municipality have no contractual relations with the city corporation; that such corporation is merely a legislative agency, and can not exceed the specific powers granted by its principal, the legislature, and fasten unlimited liability or deprivation upon the helpless people of the municipality. It must be clear that unless acting within powers, the former city council could not, over protest and contrary to law, and to public welfare, deprive the citizens of the right to a competitive water supply and make them accept for twenty years the foul substitute for water furnished by the water company, or do without.

In this connection, we beg to invite the most serious attention of the court to the variance between the findings of the Master and the decree of the court below. The findings and recommendations of the Master were adopted by the court without exception, and while the Master refused to find whether the city could create competition by granting a franchise to another company, yet the decree of the court not only enjoined the city from erecting waterworks of its own, but also perpetually enjoined it (pr. rec. 167) from entering into any contract or arrangement with any person, firm, or corporation, for the construction, lease, operation, or use of any system of waterworks, or from laying pipes or mains, or permitting the laying of pipes or mains, or from entering into or carrying out any contract for waterworks save and except the contract referred to in complainant's bill. If we understand it, the decree distinctly accords the water company an *exclusive* franchise with reference to the supplying of the city and its inhabitants with water, without qualification, until 1911, and protects it by injunction.

It is palpable that if the city could not expressly grant an exclusive franchise, the chancellor had no power to imply one based merely upon the agreement to pay for license to take water.

V.

In Subdivision V, appellee contends that the right to furnish water to the city does not arise out of the charter of the water company, but from the contract made with the city. In answer to this, we will say that if the city had no power to grant an exclusive franchise, it could not possibly acquire that power by making a contract to pay for water. It must be clear that if it had the power to delegate its duty to another corporation and to deprive the city of a competitive source of supply, it had such power independent of the contract to pay for water for fire protection.

VI.

In Subdivision VI, appellee lays great stress upon the fact that the word "exclusive" does not appear in the Georgia constitution. Appellee's argument under this subdivision needs nothing from us to demonstrate its impotence *to this court*. We merely call attention to pages 83 *et seq.*, of our main brief and especially to pages 90 *et seq.* We take it as conclusively settled that even if the prohibition referred to by appellee had been left out of the State constitution, yet the city would have been not only without power to have granted an exclusive franchise, but also without right to have deprived itself of the power to perform the duties for which created, by delegation to a private corporation. Under this subdivision, on page 21, appellee also takes up the Walla Walla case. Appellee seems to have forgotten in his argument that this court specifically held in the Walla Walla case that the *contract was not objectionable because* there had been *no attempt to grant an*

exclusive privilege; that it was within the powers specifically granted to the city of Walla Walla, by statute, and the city *expressly agreed not to erect waterworks of its own*, and not to avoid the contract except in the manner expressly agreed upon. In the case at bar, it is admitted that the city never expressly agreed not to erect waterworks of its own, yet it is insisted that an exclusive franchise was granted by implication and that the city must pay, performance or no performance, which is the reverse of what was held in the Walla Walla case. Further on in the same subdivision appellee contends in effect that the water company is entitled to a monopoly because, forsooth, "there is no provision in the Georgia constitution forbidding monopolies and trusts." We shall not dignify such a contention by discussing the same before this Honorable Court.

VII.

In Subdivision VII, appellee returns for the third time to the prohibitions contained in the Georgia constitution. For answer we refer to what we have said in Subdivision III, *supra.*

VIII.

In Subdivision VIII, appellee returns again to the prohibitions contained in the State constitution, and for answer we refer to what we have said in Subdivision III, *supra.*

IX.

In Subdivision IX, still contending that it was within the power of the city to grant the exclusive right, appellee says that if the contract is not valid in its entirety, and to the extent of the import of the words taken literally, it is nevertheless to be upheld to the extent that such grant was permissible. In answer, we will say that the city is willing that any lawful part of the grant, if any, be upheld. It has contended, and still contends, however, that no exclusive

franchise was granted, and, if this contention be correct, the corollary is that there is no equitable jurisdiction and the decree and judgment of the circuit court should be reversed and the bill dismissed.

The object of appellee's bill was (1) to enforce the collection of water rentals, (2) to prevent the city from violating its agreement to commute taxes, and (3) to protect from impairment the exclusive franchise alleged to have been granted the water company.

We think we have conclusively established that equitable jurisdiction could not be invoked because of the refusal to pay water rentals (see our former brief, pages 75 *et seq.*).

The court below found that the agreement to commute taxes was void.

It is plain, then, that equitable jurisdiction is predicated solely on the alleged grant of exclusive franchise which was held to exist by the court below.

As it is clear that the city could not have granted an exclusive franchise, the appellee must be denied equitable relief, since its remedies are clearly legal, if it had any rights. But it had no rights because not a cent of principal or interest was due when the bill was filed, and as there was no diversity of citizenship, in so far as complainant was concerned there was not even any subject-matter for jurisdiction, the appellee being at best the assignee of a litigated right.

X.

In Subdivision X, appellee suggests that—

> "it seems to be hardly a sound proposition that the city has the right to contract for water supply for its inhabitants; bind the other party to furnish water to every inhabitant in ample quantities;"

and yet say that the city is without power to stipulate that the company shall have the exclusive right to do what it is required to do; that such a contract binds only the party upon

whom the burden falls. It should seem a sufficient answer to this to say that the company never furnished the required water in ample quantities, and there is no way in which the city could force it to do so, the evidence showing not only that the water company was not able to satisfactorily perform its contract, but also that it was practically insolvent and judgment proof (see pages 145 *et seq.* of our main brief). Besides, the Supreme Court of Georgia held that this contract was operative only from year to year, and that either party could renounce it. We have not anywhere claimed that the water company was any more bound to this contract than the city.

If the city is bound by its contract to pay the water rentals and the water company has earned them, the right to collect them is plainly legal. It is preposterous to say that because the city's contract to pay rentals is valid, the water company acquired an exclusive right; that the citizens of Dawson must take the water furnished, good, bad, or indifferent, or do without, and that the city must pay for the water license whether the performance by the water company has been substantial, merely simulated, or even notwithstanding no performance at all.

XI.

In Subdivision XI, appellee contends that the Joplin case (191 U. S. 150) has no possible application to the case at bar. As we have fully discussed and applied that case on pages 94 *et seq.* of our former brief, we leave it for the court to determine its applicability to this case without further comment.

XII.

In Subdivision XII, appellee returns to the Walla Walla case. In answer, we merely refer to the discussion of this case on pages 88 and 95 of our former brief, and in the present brief under Subdivision VI, *supra.*

XIII.

Subdivision XIII of appellee's brief seems to consist merely of an attempt by counsel to prejudice this court against the city of Dawson. We have no further comment to make in regard thereto.

XIV.

In Subdivision XIV, appellee cites authorities to show that a resolution is equivalent to an ordinance *if passed with all the formality of an ordinance,* and may be a legislative act impairing the obligation of a contract, the allegation of impairment in the case at bar being based upon a resolution passed by the city council of Dawson in 1894. We desire to invite the attention of the court, however, to the fact that this resolution which, it is alleged, impaired the contract with the water company, was not passed with the formality prerequisite to the passage of an ordinance under the charter of Dawson.

Section 15 of the rules for government of the council (pr. rec. p. 230) requires that any proposed ordinance must be read to the council at the meeting when offered—

> "but in no case shall action be taken thereon except by unanimous vote of the council voting an urgency in said matter. At the next or any subsequent meeting of the council, the said ordinance or amendment shall be again read and be subject to such revision or alteration as the council may deem proper," etc.

It will be noticed that counsel for appellee makes no claim that this resolution was adopted with the formality required of an ordinance.

XV.

In Subdivision XV, appellee rediscusses the question of *res judicata* without discovering any matter which we have not fully discussed on pages 102–112 of our main brief.

XVI.

In Subdivision XVI, appellee discusses the construction of the Iowa constitution as to debt limitation. As stated in our former brief, we believe that the court will determine the issue presented here in accordance with the constitution of Georgia, and the construction placed upon the debt limitation therein by the Supreme Court of said State. Said court held that a city can not contract for a supply of water for a longer period than one year, and that a contract for twenty years, each year's supply to be paid for semi-annually from year to year, is operative from year to year only, so long as neither party renounces or repudiates it, citing with approval Cartersville *vs.* Cartersville (89 Ga. 683); Cartersville Water *vs.* Cartersville (89 Ga. 689); Lewis *vs.* Lofly (92 Ga. 804); Habersham *vs.* Porter (103 Ga. 613), and overruling, in part, Spann *vs.* Webster (64 Ga. 898); Cabaniss *vs.* Hill (74 Ga. 845).

Particular attention is invited to the fact that the cases overruled in part were decided long prior to the date of the contract in issue and they were overruled only because the court was disposed to concede more liberal powers to municipalities. In other words, the constitutional prohibition as to indebtedness was more literally and severely construed prior to the date of the contract than since. The fact that the inhibitory provision was more unqualifiedly applied prior to the transaction strengthens the conclusiveness of the more liberal rule subsequently adopted (1892) and maintained without deviation up to the decision of the Supreme Court in the case at bar.

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FEBRUARY 2, 1905.